HHB-CV-15-6029797-S	**:**	**SUPERIOR COURT**
COMMISSIONER, STATE OF CONNECTICUT DEPARTMENT OF EMERGENCY SERVICES AND PUBLIC PROTECTION, ET AL.	**:**	**J.D. OF NEW BRITAIN**
V.	**:**	**AT NEW BRITAIN**
FREEDOM OF INFOFRMATION COMMISSION, DAVID ALTIMARI AND THE HARTFORD COURANT,	**:**	**FEBRUARY 8, 2016**

MEMORANDUM OF LAW OF THE DEFENDANTS FREEDOM OF INFORMATION COMMISSION AND THE HARTFORD COURANT AND DAVID ALTIMARI

I. NATURE OF THE PROCEEDINGS

This is an administrative appeal from a decision of the Freedom of Information ("FOI") Commission brought pursuant to Conn. Gen. Stat. §§1-206(d) and 4-183(b). The plaintiffs seek review of the decision of the FOI Commission in its contested case docket number FIC 2014-373, Dave Altimari and The Hartford Courant v. Commissioner, Department of Emergency Services and Public Protection et al., based upon the assignments of error in the plaintiff's appeal dated June 26, 2015. On September 28, 2015 the Court granted the motion of the State of Connecticut Division of Criminal Justice ("Division") to intervene as a party plaintiff. On January 11, 2016 the intervening plaintiff adopted and joined the brief filed by the named plaintiffs filed on or about December 21, 2015.

II. INTRODUCTION

This case hangs on the theory of the plaintiff Department of Emergency Services and Public Protection (the "DESPP") that properly seized documentary evidence in DESPP's custody, compiled to investigate a crime used to establish criminal culpability in a subsequently closed police investigation, cannot *also* be a public record subject to copying and dissemination under the FOI Act. The plaintiffs' argument requires the court to endorse the view that records cannot serve dual purposes, both as evidence in the criminal case to establish culpability, *and* as public records subject to the FOI Act to ensure transparency for the actions of law enforcement agencies in closed cases. The plaintiffs' claim that the records in the custody of the DESPP are under court control and therefore confidential ignores the ironic fact that the records would clearly be public had they been filed as evidence in court. For all of the reasons set forth below, the plaintiff's appeal should be dismissed because there is no conflict between the records' dual role as evidence in a case, and public records under the FOI Act.

III. STATEMENT OF FACTS

Substantial evidence exists in the record for the following facts: This case began with a January 24, 2014 request by the Courant to the DESPP for 35 documents referred to in two State Police investigation reports regarding the shooting at Sandy Hook Elementary School in Newtown, Connecticut. (R. 116, 303). The 35 requested records consist of various writings, photos, drawings and other documents compiled by the DESPP pursuant to certain search warrants issued to investigate the Sandy Hook shootings. (R. 304 ¶6). On May 29, 2014, the Courant sent a second letter to follow up and to reiterate the first request. (R. 115) The DESPP did not respond, and on June 11,

2014 the Courant and Altimari appealed to the FOI Commission. (R. 1). Subsequently, on December 8, 2014, almost a year after the initial request, the DESPP sent the Courant a letter denying the request. (R. 136). The DESPP's letter, signed by Christine Plourde of the Legal Affairs Unit, asserted that "[e]vidence *collected as part of a criminal investigation* does not constitute a 'public record' under the Connecticut Freedom of information Act and, therefore, there are no documents responsive to your Freedom of Information Act request." [Emphasis added]. *Id*.[1]

A hearing on the Courant's complaint was scheduled for January 6, 2015. (R. 10). Prior to the hearing, the Courant served a subpoena duces tecum on Christine Plourde to bring with her to the hearing and submit the requested records to the Hearing Officer for an in camera review. (R. 137) The DESPP ignored this subpoena.

At the hearings on January 6 and February 19, 2015, the DESPP argued that the requested records were not public records because the DESPP obtained the documents pursuant to a search warrant. The DESPP requested that the hearing be bifurcated: first, to determine whether the requested records were public records subject to the FOI Act at all; and second, to determine, if they were public records, whether they were nonetheless exempt from disclosure. (R. 6). Although the hearing officer denied the request to formally bifurcate the hearing, she nonetheless permitted the DESPP to put on their case that the records were not public records, and ultimately continued the evidentiary hearing

[1] At the evidentiary hearings before the FOIC, the DESPP quibbled over the use of the word "compiled" to describe DESPP's assembling of the seized records for review and investigation, but seemed to admit that they were so compiled *if* they were records. *See* R. 49-53. *See* Webster's Third New International Dictionary Unabridged (Merriam-Webster Inc., 1993) at page 464 ("compile" defined as "to collect and assemble (written material or items from various sources) into a document or volume or a series of documents or volumes." *See also* R. 136, which describes the requested records as having ben "collected" for law enforcement purposes.

to a second day to give the respondents an opportunity to present any claims of exemption. (R. 100-101, 226, 304 at ¶9). However, the only evidence presented by the DESPP in support of its claims of exemption was entirely speculative, and was based upon the affidavit of a witness who admitted that she had never actually viewed the documents. (R. 214). In that affidavit, Plourde simply speculated without foundation as to exemptions that *might* apply. Plourde explicitly stated in her affidavit that she had "never seen the 35 items of seized property requested by Dave Altimari and I am therefore unable to completely articulate what, if any Freedom of [Information] Act exemptions might apply to those items." (R. 216).

` The DESPP put on various witnesses at the first hearing, who gave testimony concerning procedures regarding search warrants, and the DESPP's policies regarding the safeguarding of seized evidence. (R. 15-113 transcript, *passim*). Although the DESPP presented evidence that Plourde herself didn't have access to the requested records (and in fact had never looked at them), there was no dispute that others did and had. Indeed, the DESPP admitted that at least some of the evidence had already been either copied or photographed, and that such photographs and photocopies would be public records subject to disclosure unless FOI exemptions applied. (R. 58, 207-207, 326 fn.1). The evidence also established that although DESPP procedures regulated access to the requested records, the records were in fact removed from the evidence room, for example, for review by the Federal Bureau of Investigation Behavioral Analysis Unit, and were available for inspection by a variety of other people. (R. 4, 96, 119).

There is also no dispute that the requested records were used by the DESPP to investigate the background, motives and mental health of the shooter, and are a

significant source for the November 25, 2013 summary of the investigation into the shootings prepared by the State's Attorney for the Judicial District of Danbury. That summary, which the FOI Commission took administrative notice of (R. 303 ¶20), goes into the educational and mental health background of the shooter, including written evaluations of various types, his diagnoses, testing, medications, emotional and mental health issues, and school performance. (Summary at 34-35). The summary is explicitly based upon some of the records sought by the complainants, including the so-called "Big Book of Granny" (Summary at 33) (see also R. 311 ¶47) and other writings, including school assignments, by the shooter on the subjects of mass murders and serial killing (Summary at 32, 34 ¶9). The use of these records is revealed by the search warrant application for the seized evidence, which avers that the records sought to be seized included:

> Written documents presumed to be authored and/or collected by [the shooter]. These documents include but are not limited to personal notes, memoirs, and thoughts presumably created by [the shooter]. *Documents such as these are routinely utilized by investigators to develop a psychological profile of the author of such.* [Emphasis added.]

It is true that the DESPP presented evidence that they did not "own" the requested records, that the seizure and disposition of the evidence was subject to court orders, and that seized evidence might ultimately be returned to the original owners. (R 90-91, transcript *passim*). However, the DESPP presented no evidence that the court regulated or prohibited the making of copies by DESPP, or the dissemination of such copies by the

DESPP. Indeed, the DESPP conceded that it had made copies for its own use; it only contends that it should not be required to do so for the public under the FOI Act.

The hearing officer issued a proposed decision on April 21, 2015, which was considered and adopted by the FOI Commission as its final decision at its May 13, 2015 regular meeting. (R. 291, 302). The decision concluded that the requested documents were public records within the meaning of Conn. Gen. Stat. §1-200(5) because they were recorded data or information received and retained by the DESPP, used by the DESPP in the performance of its public function to investigate the shootings, and pertained to the conduct of the public's business. (R. 296). The Commission found that the requested documents informed the investigation into the shootings, and that the documents could assist the public in evaluating (a) the quality of the investigation conducted, and the conclusions reached, by the state police and (b) whether the expenditure of state resources in connection with the shootings was justified. (R. 307). The Commission took note of the heightened public interest generally in the shootings and, specifically, in knowing how and why the shootings occurred. (R. 307). The Commission concluded that there was no language in the state search and seizure statutes that provided that recorded information or data seized pursuant to a search warrant is not a public record under the FOI Act; or that provides for confidentiality, non-disclosure or limits on disclosure; or that limits copying or inspection. (R. 309)

With regard to the plaintiffs' additional claims, the Commission concluded that the nothing in the judicial department's control over the seizure and ultimate disposition of the requested records barred the DESPP from making copies under the FOI Act during the time that the records were indisputably in the custody of the DESPP. (R. 309). The

Commission further concluded that the DESPP's eminently reasonable policy of limiting which personnel had access to seized property was not a legal bar to having those limited personnel make copies under the FOI Act.

Finally, the Commission concluded that the plaintiffs, although given ample opportunity to do so, had simply declined to produce any evidence that the requested records, if public records within the meaning of Conn. Gen. Stat. §1-200(5), were exempt from disclosure under any applicable statute. (R. 311 ¶¶44, 45). The Commission in its Final Decision therefore ordered the respondents to provide a copy of the requested records to the complainants. (R. 312, ¶1). It is from that decision and order that the plaintiffs have appealed to this court.

IV. SCOPE OF REVIEW

Under Conn. Gen. Stat. §1-206(d), appeals from decisions of the FOI Commission are brought pursuant to the Uniform Administrative Procedure Act (hereinafter "UAPA"), as codified in Chapter 54 of the General Statutes, particularly §4-183(j), which at all times material provided that:

> The court shall not substitute its judgment for that of the agency as to the weight of evidence on questions of fact. The court shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) in violation of constitutional or statutory provision; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

In addition, at all times material, Conn. Gen. Stat. §4-183(i) required that the appeal be confined to the record unless there are alleged irregularities in procedure not shown in the record. See also Conn. Gen. Stat. §4-183(h).

Also, from seemingly time immemorial, Connecticut courts have restricted their role as overseers of administrative decisions. The Supreme Court summarized that role concisely in Hartford Electric Light Co. v. Water Resources Commission, 162 Conn. 89, 107-108 (1971):

> The function of a trial court is to look only to the materials before the agency and "to determine from the record whether the facts found by the commission are supported by the record, whether they furnish justifiable reasons for the action … and whether it has acted illegally or has exceeded or abused its powers." Wilson Point Property Owners Ass'n v. Connecticut Light & Power Co., 145 Conn. 243, 252, 140 A.2d 874, 880 (1958); [remainder of citations omitted]. The trial court is not to substitute its own judgment or discretion for that of the agency. Gulf Oil Corporation v. Board of Selectmen of the Town of Brookfield, 144 Conn. 61, 65, 127 A.2d 48 (1956); [remainder of citations omitted].

Thus, the reviewing court should not retry the case and should uphold the agency's decision if reasonably supported by the evidence that was heard. Caldor Inc. v. Mary M. Heslin, Commissioner of Consumer Protection, 215 Conn. 590, 596 (1990); Madow v. Muzio, 176 Conn. 374, 376 (1978); C&H Enterprises, Inc. v. Commissioner of Motor Vehicles, 176 Conn. 11, 12-13 (1978); Williams v. Liquor Control Commission, 175 Conn. 409, 414 (1978). The question to be answered by a reviewing court is not whether the reviewing court would have reached the same conclusion, but whether the record before the FOI Commission supports the action taken. Hospital of St. Raphael v. Commission on Hospitals and Health Care, 182 Conn. 314, 318 (1980). The "substantial

evidence" standard requires that the administrative decision be upheld "[i]f the administrative record provides a "substantial basis of fact from which the fact in issue can be reasonably inferred." Adriani v. Commission on Human Rights and Opportunities, 200 Conn. 307, 315 (1991); Lawrence v. Kozlowski, 171 Conn. 705, 713 (1976), cert. denied, 431 U.S. 969 (1977).

The reason for this limited scope of review is apparent. The legislature, in creating administrative agencies and granting them powers to determine controversies, has established a policy that such tribunals should be the decision-makers within their respective jurisdictions. In fact, the practical interpretation of legislative acts by governmental agencies responsible for their administration is not only a "recognized aid to statutory construction," Local 1186 v. Board of Education, 182 Conn. 93, 105 (1980); Jones v. Civil Service Commission, 175 Conn. 504, 508 (1978), it is also "high evidence of what the law is." Board of Trustees of Woodstock Academy v. FOIC, 181 Conn. 544, 552 (1980). As articulated by the Supreme Court:

> Even as to questions of law, "[t]he court's ultimate duty is only to decide whether, *in light of the evidence*, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion ….

Perkins v. FOIC, 228 Conn. 158, 164-164 (1993) [emphasis in original].

In recognition of this policy of administrative decision-making, and because such agencies develop expertise in their areas of specialization, the Connecticut Supreme Court has often held that, when reviewing agency decisions, the courts should "accord great deference to the construction given [a] statute by the agency charged with its enforcement." Perkins, supra at 165; Ottochian v. FOI Commission, 221 Conn. 393

(1992); Woodstock supra; Anderson v. Ludgin, 175 Conn. 545, 555, (1978); Corey v. Avco-Lycoming Division, 163 Conn. 309, 326 (1972) (Loisell, J. concurring); Clark v. Town Council, 145 Conn. 476, 485 (1958); Downer v. Liquor Control Commission, 134 Conn. 555, 561 (1948). Unless the agency has failed to interpret a statute in accordance with general principles of statutory construction, or the agency's determination of an issue of law has varied or has not been previously subjected to judicial scrutiny, special deference is to be given to the construction of a regulatory statute by the agency charged with its enforcement. Connecticut Alcohol & Drug Abuse Commission v. FOIC, 233 Conn. 28, 39 (1995); Starr v. Commissioner of Environmental Protection, 236 Conn. 736; City of Hartford v. FOIC, 41 Conn. App. 67, 72-73 (1996). In particular, where a statutory provision is subject to more than one plausible construction, the one favored by the agency charged with enforcing the statute will be given deference. Bridgeport Hospital v. Commission on Human Rights & Opportunities, 232 Conn. 91, 110 (1995); Starr v. Commissioner of Environmental Protection, 226 Conn. 358, 376 (1993).

Consequently, reviewing courts should not hamper a state agency's legitimate activities by substituting their judgments for those of the agencies concerned; nor should they indulge "in a microscopic search for technical infirmities …" Silver Lane Pickle Co. v. ZBA of the Town of East Hartford, 143 Conn. 316, 319 (1956); McCrann v. TP&Z Commission, 161 Conn. 65, 71 (1971). As articulated by our Supreme Court, "[i]t is axiomatic that the trial court may not substitute its judgment for that of the agency [citations omitted]." Cos Cob Volunteer Fire Co. No. 1, Inc. v. FOIC, 212 Conn. 100, 105 (1989). It should be further noted that the plaintiff, as the party bringing this administrative appeal, has the burden of proof in challenging the FOIC's decision.

Lovejoy v. Water Resources Commission, 165 Conn. 224, 230 (1973). The reviewing court may not "needlessly enlarge" the issue on appeal by analyzing questions of law not found in the record before the agency. Hartford, supra at 73. As the Appellate Court put it in that case, it is improper for the trial court to "[travel] a different path rather than determining whether the [FOI] commission properly tread on the stepping stones of the path it took." Id.

As the Connecticut Supreme Court decision in New Haven v. FOIC, 205 Conn. 767 (1988) illustrates, the trial court's scope of review over agency findings of fact is extremely narrow. The New Haven case was an appeal from a lower court's order reversing a decision of the FOI Commission requiring disclosure of attorney invoices. The Supreme Court, noting that the scope of judicial review of an administrative agency's decision is "very restricted," stated as follows:

> "…Neither this court nor the trial court may retry the case or substitute its own judgment for that of the defendant." [citations omitted]. "The court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion." [citations omitted].
>
> …Conclusions of law reached by the administrative agency must stand if the court determines that they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts. Finkenstein v. Administrator, 192 Conn. 104, 112-13, 470 A.2d 1196 (1984); Robinson v. Unemployment Security Board of Review, 181 Conn. 1, 434 A.2d 293 (1980).

Id. At 773-74

In New Haven, supra, our Supreme Court reversed the lower court, finding that it had improperly substituted its own conclusion for the FOI Commission's by applying the law to facts not reasonably supported by the record. Id. At 774. In Cos Cob, supra, the Supreme Court again reversed the lower court, finding that it had improperly substituted its own interpretation of a statutory term for that of the agency vested with the statute's enforcement. Id. At 104, 106.

Thus, the reviewing court in an administrative appeal must carefully limit the scope of its inquiry to avoid the types of error committed by the trial courts in the New Haven and Cos Cob cases.

Applying the above scope of judicial review, the FOI Commission believes that its decision should be sustained because the facts found are reasonably supported by the record, because the FOI Commission has correctly applied the law to those facts, and because the Commission has not violated any of the standards set forth in this section.

V. ARGUMENT

A. THE OVERARCHING POLICY OF THE FOI ACT FAVORS DISCLOSURE

The plaintiffs claim, for a variety of reasons, that the Commission erred in concluding that the requested records fall squarely within the definition of public records found at Conn. Gen. Stat. §1-200(5). The plaintiffs additionally claim that it was error for the Commission to decline to bifurcate the evidentiary hearing, and error for the Commission to require the plaintiffs to provide evidence in support of their claim that the

records might be exempt from disclosure. There is no foundation or merit to any of these claims.

The overarching policy of the FOI Act favors disclosure of all public records. Maher v. Freedom of Information Commission, 192 Conn. 310, 315 (1984). Records may be exempt from disclosure pursuant to Conn. Gen. Stat. §1-210(a), which provides for nondisclosure of records that are "otherwise provided" for by any state statute. As an exception to the general rule of disclosure, the "otherwise provided" language of §1-210(a) must be narrowly construed. Id.; Board of Police Commissioners v. FOIC, 192 Conn. 183, 188 (1984). "In those limited circumstances where the legislature has determined that some other public interest overrides the public's right to know, it has provided explicit statutory exceptions…. We have held that these exceptions must be narrowly construed." Lieberman v. State Board of Labor Relations, 216 Conn. 253, 266 (1990). For a record to be exempt from disclosure, a federal law or state statute must contain language that specifically provides for confidentiality or non-disclosure of the records at issue, or places limits on disclosure or copying of such records, or provides for a similar shield from public disclosure, in order for it to fall within the "except as otherwise provided" language in §1-210(a). Chief of Police v. FOIC, 252 Conn. 377 (2000) (Federal Rules of Civil Procedure are not federal laws that "otherwise provide" that records are not public records under the FOI Act; the "except as otherwise provided" language refers to "federal and state laws that, by their terms, provide for confidentiality of records or some other similar shield from public disclosure" [Id. at 399-400]; Department of Public Safety v. FOIC, 298 Conn. 703, 725 (2010) ("Megan's Law" provision requiring that sex offender registration information not be disseminated to the

the public was a state law that "otherwise provided" that the registration information was not a public record); Pictometry Int'l Corp. v. FOIC, 307 Conn. 648, 665, 671, 675-677 (2013) (Federal Copyright Act falls within the "except as otherwise provided" language because it imposes limits on the copying of public records).

Finally, the plaintiff has the burden of proving the exception's applicability. Maher, supra; Wilson v. FOIC, 181 Conn. 324, 329, 435 A.2d 353 (1980); Director, Dep't of information Technology v. FOIC, 274 Conn. 179, 189 (2005). Proof of an exemption requires more than conclusory language or generalized allegations; evidence should be sufficiently detailed to present the Commission with an informed factual basis for its decision. Wilson v. FOIC, 181 Conn. 324, 341 (1980).

V. ARGUMENT

A. THE FOI COMMISSION CORRECTLY CONCLUDED THAT THE REQUESTED RECORDS ARE PUBLIC RECORDS WITHIN THE MEANING OF CONN. GEN. STAT. §1-200(5).

As concluded by the FOI Commission, the records are public records under the plain language of the FOI Act and the DESPP has not identified any authority that suggests otherwise. There is no basis for the argument that the records take on some distinct, non-public character merely because of the means by which they were obtained.[2]

[2] *See, e.g., Harris v. Denver Post Corp.*, 123 P.3d 1166 (Colo. 2005) (finding that audio recordings of the shooters at Columbine High School, which were seized pursuant to a search warrant, were "criminal justice records" presumed under Colorado law to be available for public inspection. "Absent a court determination that the search warrant was improperly issued, [the position private records seized pursuant to a search warrant are not criminal justice records] is patently contrary to law that allows the government to intrude upon a person's privacy and validly seize evidence of a crime, though it be private property, for investigation and/or prosecutorial purposes." *Id*. at 1173. *See also Florida Office of the Attorney General, Advisory Legal Opinion – AGO 2004-51* (documents seized and made evidence as part of a criminal investigation or prosecution are "public records" under Chapter 119, Florida Statutes, the Public Records Law).

First, the well-established, longstanding rule under the FOI Act is that "all records maintained or kept on file" by a public agency are public records. Conn. Gen. Stat. §1-210(a). The records at issue here clearly are maintained and kept on file by the DESPP. As the DESPP's testimony at the January 6, 2015 hearing demonstrated, the DESPP collected the records at issue and maintains them in a State Police facility under the control of State Police personnel.

Second, the records clearly fall within the definition of "public records or files" set forth at Conn. Gen. Stat. §1-200(5), which provides:

> "Public records or files" means any recorded data or information relating to the conduct of the public's business prepared, owned, used, received or retained by a public agency, or to which a public agency is entitled to receive a copy by law or contract under section 1-218, whether such data or information be handwritten, typed, tape-recorded, printed, photostated, photographed or recorded by any other method.

As the facts recited above indicate, every prong of this definition is satisfied by the records seized by the DESPP. The plaintiffs do not contest that the records are recorded data or information that is handwritten, typed, tape-recorded, printed, photostated, photographed, or recorded by any other method. (R. 305 ¶16). Nor can they claim that the records were not used, received or retained by them. Although the plaintiffs make the unsupported claim that the information in the seized records does not relate to the public's business (plaintiffs' brief at 6), the information in these records was a substantial basis for the plaintiffs' investigation and report. The plaintiffs developed a profile of the shooter, and sought a motive for the shootings. (R. 306 ¶¶19-24). Indeed, it is difficult to

reconcile the plaintiffs' admission that the inventory and description of the documentary evidence seized is public—but that the documents themselves are not.

As the Courant argued to the Commission, the FOI Act does not require that records be "owned" by a public agency to qualify as public records; merely that they be maintained or kept on file and used. Thus, the DESPP's argument that the records are the property of a third party is not relevant. The plaintiffs appear to have placed great weight on Fromer v. FOIC, 90 Conn. App. 101 (2005) for the proposition that the seized records in the instant case are analogous to course materials used by adjunct faculty at the University of Connecticut. But the decision in Fromer derives from the Commission's conclusion that the requested lesson plans were not records maintained or kept on file by any public agency. Id. at 109. It is undisputed in this case that the requested documentary evidence is maintained and kept on file by the DESPP.

Similarly, the various arguments raised by the plaintiffs in support of their claim that the records do not fall within the definition of a public record are unavailing. The fact that rules of the Superior Court govern the initial seizure, and ultimate disposition, of the records do not alter their character as public records during the time they are in the custody of, and used by, the plaintiffs to conduct the public's business. As recited in Section III, above, no court rule or order limits the plaintiffs' copying of the records, or disclosure of the records under the FOI Act. Indeed, the seizure and disposition statutes cited by the plaintiffs are entirely silent on matters relating to FOI law. While the plaintiffs place great significance on the fact that the records may ultimately be returned to their owner, they also admit that they have made some copies for their own purposes, and do not explain why making copies for the public would interfere with the eventual

return of the records to their owner, or why the plaintiffs' internal chain of custody safeguards are insufficient to allow for copying.

Simply put, the plaintiffs have not put forth any authority that provides that records obtained by a public agency pursuant to a search warrant are not public records and may not be subject to an FOI Act request. To the contrary, the statutory scheme as a whole expressly contemplates that *records compiled by law enforcement during a criminal investigation are public records*. To protect pending prosecutions, witnesses, juveniles, informants, and the like, Conn. Gen. Stat. §1-210(b)(3)(A) through (H) creates exemptions under certain limited circumstances for such records. Obviously, there would be no need for these exemptions if the records were not public records in the first instance. Similarly, Conn. Gen. Stat. §1-215 provides for disclosure under the FOI Act of certain personal effects found on an arrestee at the time of an arrest, stating in relevant part that "[a]ny personal possessions or effects found on a person at the time of such person's arrest shall not be disclosed *unless such possessions or effects are relevant to the crime for which such person was arrested*." [Emphasis added.] Certainly, if records relevant to a crime found on a person during an arrest can be subject to disclosure under §1-215, then records compiled pursuant to a search warrant must be treated in the same manner. They both are public records, and they both must be disclosed in accordance with the FOI Act absent an applicable statutory exemption.

There is also no evidence that the legislature intended to treat records obtained pursuant to a search warrant differently from any other type of record obtained by a public agency through other avenues. At the initial hearing, the DESPP put on extensive evidence and argument regarding the statutory scheme under Title 54, Chapter 959, Part

III, which governs procedures for seized property. *See* Conn. Gen. Stat. §54-26a – 36p. Nowhere in that very detailed statute (with sixteen sections and forty-six subsections) is it suggested that such records are not public records. Refusal to produce such records in response to an FOI Act request is not even mentioned. This omission is telling, especially when coupled with the law enforcement exemption in the FOI Act that expressly contemplates that these types of records (i.e., records compiled by law enforcement) are public records that may be exempt.

Indeed, at least one prior decision of the Commission found that documents obtained pursuant to a search warrant were public records. While the Commission does not take the position that this single case calls for deference under the "time-tested and reasonable" standard (Longley v. State Employees Retirement Com'n, 284 Conn. 149 (2007)), the case nonetheless demonstrates that this is not an entirely new issue for the FOI Commission or the DESPP. In New London Day v. Dep't Pub. Safety, Docket #FIC 2010-549 (July 13, 2011), the Commission determined that Facebook communications and telephone company records, which had been seized by the State Police pursuant to search warrants, *id.* at ¶19, were public records for purposes of the FOI Act. The Commission determined that "the respondents maintain the records … and it is therefore concluded that such records are 'public records' and must be disclosed in accordance with §§1-210(a) and 1-212(a), G.S., unless they are exempt from disclosure." Id. at ¶8. The records in the New London Day case were found to be exempt from disclosure under Conn. Gen. Stat. §1-216 as they consisted of uncorroborated allegations of criminal activity. Thus, this decision demonstrates the defendants' position that documents maintained by the State Police do not take on some distinct character merely because they

were obtained by a search warrant. Such documents are public records under the FOI Act and should be disclosed in accordance with its provisions.

A. THE FOI COMMISSION DID NOT ERR OR CAUSE ANY SUBSTANTIAL PREJUDICE TO THE PLAINTIFFS BY DECLINING TO FORMALLY BIFURCATE THE ISSUE OF WHETHER SEIZED PROPERTY IS A PUBLIC RECORD

The hearing officer at the evidentiary hearings declined to formally bifurcate the two issues before her (whether the records fell within the definition of public records, and whether, if they were public records, they were exempt from disclosure). Nonetheless, the proceedings were effectively bifurcated. The first hearing principally addressed the first issue, whether the records fell within the statutory definition. The hearing officer then continued the hearing to a second day, to permit the plaintiffs to present evidence of the exemption of the records (which the plaintiffs largely failed to do). The Commission does not understand how the plaintiffs were prejudiced by the conduct of the proceedings. They claim in their brief that their witness "did not examine each item line by line because to do so would require her to disturb the chain of custody." In fact, their witness had not examined the records at all. In fact, their witness was not even available to testify. In fact, other individuals within the DESPP had examined the records, and the plaintiffs have not suggested why such individuals could not have been brought to testify. In essence, the plaintiffs brought the affidavit of a witness who had no first-hand knowledge of the records at issue—and then blamed their failure to prove any applicable exemptions on the way proceedings were conducted.[3]

[3] It is far from obvious how any exemptions would apply. The plaintiffs' witness speculated about records falling under the Family Educational Rights and Privacy Act ("FERPA"), but that federal statute prohibits public schools that receive federal funds from disclosing education records. "Educational records" are defined at 20 U.S.C. §1232g (a)(4)(A) as those records, files, documents, and other materials which (i)

VI. CONCLUSION

The plaintiffs never presented any persuasive reason why seized documentary evidence cannot be copied for the public in the same way that it is copied for the plaintiffs' own purposes. They never pointed to any court rule or order prohibiting copying or disclosure. They never reconciled their claim that the records were controlled by the court and thus confidential, with the common sense observation that, had the evidence been submitted at trial, it clearly would have been open to the public. They never even provided a witness who had examined the records.

The plaintiffs were not prejudiced in any way by the FOI Commission's proceedings, and they have not articulated any rational reason how they would be harmed by the copying and disclosure of the requested records.

For these and all the above-cited reasons, this appeal should be dismissed and the decision of the FOI Commission affirmed.

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contain information directly related to a student and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution. The plaintiffs are not an educational agency, and cite to no law that expands that protective coverage to records in the custody of law enforcement agencies.

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DEFENDANTS DAVE ALTIMARI AND THE HARTFORD COURANT

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CERTIFICATION OF SERVICE

I certify that a copy of the foregoing was mailed, postage prepaid, or emailed to the following counsel of record on February 8, 2016:

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